

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

74-2180

To be argued by
IRWIN B. ROBINS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2180

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Plaintiff,
—against—

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN
COUNTY, STERLING NATIONAL BANK & TRUST COMPANY OF
NEW YORK, NATIONAL BANK OF NORTH AMERICA, DAGMAR
AUERBACH STUART, OLGA AUERBACH, HELGA RUTH JEN-
NINGS, IRVING GEIST, KENNETH DEMBSKI, ROYAL S. MARKS,
SAMUEL HADDAD, NATALIE HADDAD, HENRY HECHT, SR.,
ALICE HECHT, MARY ELLEN HECHT and HENRY HECHT, JR.,
Defendants,

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN
COUNTY, DAGMAR AUERBACH STUART, OLGA AUERBACH and
HELGA RUTH JENNINGS,

Defendants-Appellees,

and

ROBERT B. SCHINDLER, as Trustee in Bankruptcy
Lawrence E. Simon, Bankrupt,

Intervenor

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF APPELLEES DAGMAR AUERBACH STUART,
OLGA AUERBACH AND HELGA RUTH JENNINGS**

OTTERBOURG, STEINDLER,
HOUSTON & ROSEN, P.C.

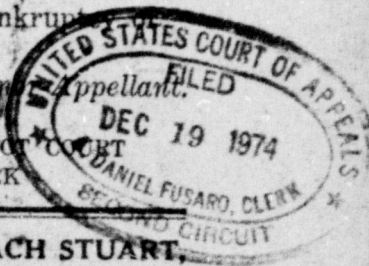
Attorneys for Appellees

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Docket No. 74-2180

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Plaintiff,

—against—

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN COUNTY, STERLING NATIONAL BANK & TRUST COMPANY OF NEW YORK, NATIONAL BANK OF NORTH AMERICA, DAGMAR AUERBACH STUART, OLGA AUERBACH, HELGA RUTH JENNINGS, IRVING GEIST, KENNETH DEMBSKI, ROYAL S. MARKS, SAMUEL HADDAD, NATALIE HADDAD, HENRY HECHT, SR., ALICE HECHT, MARY ELLEN HECHT and HENRY HECHT, JR.,

Defendants,

LAWRENCE E. SIMON, THIRD NATIONAL BANK OF HAMPDEN COUNTY, DAGMAR AUERBACH STUART, OLGA AUERBACH and HELGA RUTH JENNINGS,

Defendants-Appellees,

and

ROBERT B. SCHINDLER, as Trustee in Bankruptcy of
Lawrence E. Simon, Bankrupt,

Intervenor-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF APPELLEES DAGMAR AUERBACH STUART,
OLGA AUERBACH AND HELGA RUTH JENNINGS**

Statement of Issues Presented for Review

1. Did the District Court commit reversible error when it concluded that, because a garnishee was indebted to the judgment-debtor at the time when levy was made on behalf of a judgment-creditor, the judgment-creditor's levy attaches to debts owing by the garnishee to the judgment-debtor which subsequently became due while the levy remained effective?

2. Should this Court reverse the District Court's judgment (as against this appellee) when the appellant raises in his brief an issue (a) which was not raised below; (b) related to a document which was not before the Court; (c) which document, on its face, applies to a motion for summary judgment which was denied prior to the judgment from which this appeal is taken, and (d) in respect of which the appellant in fact seeks no relief as against this appellee?

Statement of the Case

This is an appeal from a judgment of the United States District Court for the Southern District of New York (per Hon. Marvin E. Frankel, U.S. D.J.) in the within interpleader action, disposing of a fund (the "Fund") aggregating approximately \$300,000 which has now been paid into the Registry of the Court by plaintiff Massachusetts Mutual Life Insurance Company ("Mass Mutual") representing amounts owed by Mass Mutual to defendant-appellee Lawrence E. Simon ("Simon"), a former general agent of Mass Mutual.

The appellant is intervenor Robert B. Schindler, the Trustee in Bankruptcy of Simon (for purposes of this appeal, intervenor-appellant will be referred to as the "Trustee").

This brief is filed on behalf of defendant-appellees Dagmar (also known as Dasha) Auerbach Stuart, Olga Auerbach and Helga Ruth Jennings, the distributees of the

Estate of Josef Auerbach ("Auerbach") who have been awarded out of the Fund, pursuant to the judgment, the sum of \$71,000 plus interest at the legal rate from December 27, 1967, less amounts previously collected from other garnishees.* Auerbach, at his death, was a judgment-creditor of Simon to the extent of \$71,000 plus interest, and had levied on Mass Mutual in January, 1968. The Fund was claimed not only by Stuart (Auerbach), but by numerous other creditors of Simon, all of whom were named as defendants in the within action. Basically, the District Court held that two creditors, Stuart and defendant-appellee Third National Bank of Hampden County ("Third National"), a secured creditor of Simon were entitled to priority in the Fund as against all other defendants including Simon and the Trustee. The Court also held that, after Stuart's judgment had been satisfied, Simon was entitled to a certain part of the Fund ahead of the Trustee. The Trustee has appealed from the entire judgment.

After two days of trial, Judge Frankel, by order dated May 15, 1973, referred the interpleader action to Honorable Gerard L. Goettel, United States Magistrate sitting as Special Master, to hear and report. After two more days of trial, the Magistrate delivered a proposed report dated January 30, 1974 to attorneys for all parties (90a-120a).** After giving them an opportunity to respond to his report, he amended same on February 20, 1974 (121a-125a) and

* The interests of Auerbach's Estate in the interpleader action were represented by Mrs. Stuart as Executrix. Since the filing of the notice of appeal, the caption has been changed to reflect the distribution of the interest of the Estate in the action to the distributees. Nevertheless, inasmuch as the Trustee in his brief has referred to Stuart alone as representing the interests originating with Auerbach, we shall do likewise in this brief.

** "a" preceded by a number refers to a page number of the Appendix of Appellee Third National Bank of Hampden County.

after a further hearing, issued a Special Master's Supplemental Report on March 11, 1974 (126a-131a).

On March 19, 1974, Magistrate Goettel notified counsel that the time for serving written objections pursuant to Rule 53(e) (2) of the Federal Rules of Civil Procedure had been extended to April 1, 1974. This time was subsequently extended further and, on or about April 11, 1974, the Trustee filed his objections to the Special Master's Report and Supplemental Report (160a-165a).

By opinion dated July 3, 1974 (166a-168a), Judge Frankel affirmed the Report and Supplemental Report of the Magistrate sitting as Special Master, and on July 31, 1974, Judge Frankel signed the judgment (169a-170a) from which this appeal is being taken. In so far as Stuart is concerned, Judge Frankel made no separate findings or conclusion in his opinion. Having found that the Special Master's proposed findings of fact were "solidly grounded in the record" and that (with exceptions not relevant to Stuart) the ultimate conclusions of law were likewise approved (166a), Judge Frankel approved and adopted the rulings proposed by the Special Master (168a). The Special Master's Supplemental Report is inapplicable for purposes of this appeal, to Stuart. For these reasons, we shall refer exclusively to the Special Master's Report for the findings and conclusions relevant to Stuart.

The Issues in this Appeal as Against Stuart

Originally (as against Stuart), the Trustee appealed on two principal issues: whether, having attached to a debt owing by the garnishee to the judgment-debtor, Stuart's judgment attached to debts coming due thereafter which were contingent at the time of the levy (Br. 29*) (Point

* "Br." followed by a number refers to the Trustee's Brief on Appeal.

VII); and whether Stuart's lien was void by virtue of "dormancy" (Point VIII). The Special Master had held that the latter argument (which he said was the "only serious attack" made by the Trustee below (108a)) was barred on the ground of *res judicata*. The Special Master held that the Trustee could have made this argument in the Supreme Court of the State of New York, where he attacked Stuart's levy, and that the Trustee's failure to do so there was a proper ground of invoking the doctrine of *res judicata* against him in the Court below.

Since the filing of his brief, the Trustee has, by stipulation with Stuart's counsel, withdrawn his appeal in so far as it involves the issue raised in Point VIII.

The Trustee's brief also contains a Point IX, which is not really an attack on Stuart's position but rather on that of Third National. We shall nevertheless address a few words to Point IX separately, because we believe that the argument not only should not be before the Court (having been waived and abandoned below), but that it is clearly an erroneous argument.

Statement of Facts

In so far as Stuart's remaining dispute with the Trustee is concerned, all of the relevant facts have been stipulated or are otherwise not in dispute.

(a) *Auerbach's judgment: December, 1967.* On December 27, 1967, the United States District Court for the Southern District of New York entered judgment against Simon in favor of Auerbach in the amount of \$77,000 with interest, which judgment was docketed in the office of the Clerk of the Supreme Court and County of New York on January 9, 1968; a transcript issued, following which exe-

cutions were delivered to the Sheriff of the City of New York, New York County Division (Stip. ¶ 19, 80a).*

(b) *The perfection of Auerbach's lien: January, 1968.* On or about January 19, 1968, Mass Mutual was served with an execution and Sheriff's levy by the Sheriff on behalf of Auerbach (Stip. ¶20, 80a), which levy has been successively extended by a series of orders of the Supreme Court of the State of New York, County of New York, well past the date of the commencement of the within action (Stip. ¶ 21, 80a).**

(c) *The existence of a debt owing by Mass Mutual to Simon at the time of Auerbach's levy.* As of the date of Auerbach's levy, Mass Mutual was indebted to Simon, a former general agent, in the amount of at least \$7,606.85 representing renewal commissions earned by Simon but not yet paid to him (Tr. 175-77, 141a).***

In addition, Mass Mutual was indebted to Simon for any amounts due and owing under an agreement between Simon and Mass Mutual denominated the "Floor Plan Agreement" (Exhibit "C" to the Complaint, 27a), pursuant to which Mass Mutual was obligated to pay to Simon the

* "Stip." followed by a number refers to a paragraph of the Stipulation of Facts among the parties dated February 26, 1973 (77a-86a).

** On March 12, 1968 the Supreme Court of the State of New York, County of New York, extended the levies for a period of 120 days from that date, to expire on July 11, 1968. On July 9, 1968, July 1, 1969, June 9, 1970, May 7, 1971 and May 5, 1972, the Supreme Court of the State of New York, County of New York, extended the levies for successive periods of one year each from the date of each order (Stip. ¶21, 80a). In fact, during the pendency of this action, additional orders were issued by the Court extending the levies for further periods of one year, and such levies remain in force as of the date of this appeal.

*** "Tr." followed by a number refers to a page of this Transcript.

amount, if any, by which \$27,888 exceeded Simon's "General Agent's Commissions" (as defined in the Floor Plan Agreement) for the preceding year.

(d) *The extent and composition of the Fund.* By the date of the commencement of the interpleader action (May 12, 1970), Mass. Mutual held in escrow a total of \$144,382.22, consisting of amounts due and owing to Simon and claimed by the defendants (other than Simon) in the interpleader action. This sum was comprised of three portions: \$48,971.26 representing Floor Plan payments payable to Simon under the Floor Plan Agreement; \$95,014.21 representing renewal commissions payable to Simon under his General Agent's Agreement with Mass. Mutual (Exhibit "A" to the Complaint, 22a)*; and \$396.75 representing commissions payable to Simon for new business generated by him after May, 1969 (Stip. ¶18, 79a).

As of January 2, 1973, Mass. Mutual held in escrow an additional sum of \$153,206.67 set aside after May 12, 1970, consisting of Floor Plan payments in the amount of \$82,495.47; and renewal commissions in the sum of \$69,859.31, and \$851.89 (Stip. ¶41, 84a). Such amounts have since been paid into the Registry of the Court along with an additional \$35,359.16 and are held subject to the jurisdiction of the Court and the entry of a final judgment herein. For purposes of this brief, all sums paid into the Court are referred to collectively as the "Fund".

(e) *The commencement of this action: May, 1970.* On May 12, 1970, Mass. Mutual commenced this action and some time thereafter, paid \$144,382.22 into the Registry of the Court.

* Of which at least \$7,606.85 was owed at the time of Auerbach's levy.

(f) *Simon's bankruptcy: July, 1970.* On July 21, 1970, Simon filed a bankruptcy petition in the United States District Court for the Southern District of New York (File No. 70 B 548), and was adjudicated a bankrupt on the same date. On September 8, 1970, the Trustee was appointed (Stip. ¶¶ 33-34, 82a-83a).

POINT I

Because Mass Mutual was indebted to Simon at the time when levy was made on behalf of Auerbach, Auerbach's levy attached to debts owing by Mass Mutual to Simon which subsequently became due while Auerbach's levy remained effective.

The Trustee's Point VII consists *in haec verba* of the argument made by him in his Supplemental Trial Memorandum before the Special Master (151a-158a), to the effect that Stuart's lien is limited to \$7,606.85, the debt owing by Mass Mutual to Simon at the time of Stuart's (Auerbach's) levy. The Special Master, in his report, fully answered the arguments made by the Trustee below, pointing out that the law allows a lien to continue so as to attach to post-levy debts, but the Trustee has not even gone to the trouble of *mentioning* the opinion below, let alone dealing with any alleged error of law that was made. Indeed the entire argument as presented and the authorities cited by the Trustee stand for a proposition that the Special Master accepted, but which is fundamentally irrelevant to his report.

Point VII of the Trustee's brief is so simple to deal with, that it needs hardly any extended analysis. The salient facts and legal principles involved are as follows:

(1) The Trustee argues under CPLR § 5201 that the future Floor Plan payments (i.e., those for the years ending December 31, 1968 and later) were contingent at the time of the levy in January, 1968; Stuart concedes this and concedes further that, if there had been no debt owing by Mass Mutual to Simon at the time of the levy, her levy would not attach to such later Floor Plan payments.

[Here the Trustee stops his legal argument without considering and/or understanding the remaining facts and legal principles applicable to them, which are completely dispositive of his argument.]

(2) The Trustee acknowledges that at the date of levy, there was a debt of at least \$7,606.85 owing by the garnishee, Mass Mutual, to Simon, to which he says the lien attached:

"... the levy validly attached to the stated sum [\$7,606.85] because it was in the possession of Massachusetts Mutual at the time thereof..."
(Trustee's Objections to Special Master's Report and Supplemental Report, Objection #14, 164a).

(3) The future Floor Plan payments did in fact subsequently become due on the first day of January, 1969 and each succeeding year. By the date of the commencement of this action, all Floor Plan payments held in escrow totalled \$48,971.26 (Stip. ¶ 18, 79a). By January 2, 1973, an additional \$82,495.47 in Floor Plan Payments had been accrued (Stip. ¶ 41, 84a).

(4) The levy continued to be extended for each year in question.

(5) Since the levy continued in effect, it attached to these debts when they became due.

Point VII of the Trustee's brief is undoubtedly directed to the following finding of fact and conclusion of law of the Special Master, as adopted by the District Court (we say "undoubtedly directed" even though the Trustee nowhere in Point VII *mentions* the Report):

"At the time of the Stuart levy the plaintiff owed Simon approximately \$7,606.85 in commissions and floor plan payments (a floor plan payment having accrued on January 1 [1968]).* These sums were not paid because of the restraining notice of Geist [another defendant] and the prior lien on the renewal commissions of the bank [defendant Third National Bank of Hampden County]. Consequently, the levy was a continuing nature.

"Weinstein, Korn and Miller, in their treatise on New York Civil Practice, in discussing the continuing nature of such a levy, state:

"The third sentence of CPLR 5232(a) makes it clear that an effective levy applies not only to the judgment-debtor's property held by the garnishee or debts owed to the debtor by the garnishee at the time of service, but also to any of the judgment-debtor's property that comes into the garnishee's possession or custody or any debt owed to the judgment-debtor coming due while the levy is effective. The continuing nature of a levy under

* The Trustee does not object to the Special Master's finding that, in addition to the amount of \$7,606.85, there was a "debt past due" owing to Simon consisting of the Floor Plan payment for the year ended December 31, 1967, which payment came due on January 1, 1968. It is not necessary to deal separately with this debt in order to sustain the Court below, because of the Trustee's admission that on the date of levy there was a debt (the \$7,606.85) owing from Mass Mutual to Simon. Obviously, however, the 1967 Floor Plan Payment debt alone would have supported the Special Master's finding and conclusion.

CPLR 5232(a) is in accord with the similar character of the restraining notice and the levy under an attachment. See ¶ 5232.13; CPLR 6214.⁶ *Weinstein-Korn-Miller, supra*, ¶ 5232.10 (1972).

"The Trustee argues that the future floor plan payments were contingent and not certain and that, under Section 5201 of New York's CPLR, they did not attach. *This is true*. However, *when the payments became due, the levy, still being in effect, attached to them*, at least until such time as Simon filed in bankruptcy (a point considered in the Section "Rights of the Trustee", *infra*.)" (Report of the Special Master, 107a-108a) (Emphasis supplied).

What error is alleged here by the Trustee to have been made in the above-quoted finding and conclusion? None. How does the Trustee avoid the plain language of CPLR § 5232(a)? He doesn't even mention the section, let alone distinguish it.

Indeed, as an indication of how frivolous this appeal is, it will be seen that his entire Point VII and all of the authorities cited in it do nothing more (if that) than lend some support to an argument *which was accepted* by the Special Master in the last paragraph quoted above, namely, that under CPLR § 5201, the levy did not attach, at the time—i.e. January, 1968—to future Floor Plan payments (i.e. those which came due on January 1, 1969 and thereafter), because the future payments were contingent at

* The Special Master held that a judgment lien continued to attach to Floor Plan payments even after the bankruptcy and related back to the date of perfection of the judgment lien, some 30 months before bankruptcy (Special Master's Report, 115a). The Trustee does not question the validity of this conclusion.

that time.* The Trustee's authorities do not, however, in any way relate to, let alone invalidate, the conclusion of the Special Master that:

"[W]hen the [future] payments became due [i.e., on January 1, of 1969, 1970, 1971, etc.], the levy, still being in effect, attached to them . . ." (108a).

* The Trustee quotes (Br. 33) a portion of the opinion in *Frederick v. Chicago Bearing Metal Co.*, 221 App. Div. 588, 224 N.Y. Supp. 629 (1st Dept. 1927), where the Court stated:

"There can, then, be no attachment of or levy upon a contingent right, which may or may not become a cause of action according to the occurrence or non-occurrence of a future event." (224 N.Y. Supp. at 630)

However, he fails to qualify that quote by a preceding quote of the Court:

"Here there is no liability *presently* fixed to pay anything, except upon the accident of profits accruing." (Emphasis supplied) 224 N.Y. Supp. at 630).

Thus, the Court concluded that on the date of the attachment, the judgment-debtor only had a contingent right. This is clearly distinguishable from the instant case, where the judgment-debtor had a fixed and determined right to at least \$7,606.85 owing by Mass Mutual.

To the same effect as the *Frederick* case, and equally irrelevant and distinguishable are the other cases cited by the Trustee in Point VII: *Herman & Grace v. City of New York*, 130 App. Div. 531, 114 N.Y. Supp. 1107 (1st Dept. 1909), *aff'd*, 199 N.Y. 600, 93 N.E. 376 (1910) (no debt due on construction contract until work completed); *176 East 123rd Street Corp. v. Frangen*, 67 Misc. 2d 281, 323 N.Y.S. 2d 737 (Civ. Ct., N.Y. Co.) (fund sought to be executed upon by New York City was determined not to be absolutely owing to the judgment-debtor of the City; therefore, not a debt owing to the landlord, and not subject to the City's lien); *Glassman v. Hyder*, 23 N.Y. 2d 354, 296 N.Y.S. 2d, 783 (1968) (rents were determined to become due at the end of the month and attempted attachment of the prospective obligations of tenant to pay such rents was not a past or present obligation or a certain debt upon which attachment could be issued; therefore on the date of attachment no fund existed); *Mobile Oil Corp. v. Lovotro*, 65 Misc. 2d 729, 318 N.Y.S. 2d 989 (Monroe Cty. 1971) (rents not yet due on date of attachment; therefore there existed no fund to attach); *Suffolk Auto Liquidators, Inc. v. Eastern Auto Auctions, Inc.*, 74 Misc. 2d 411, 343 N.Y.S. 2d 806 (Sup. Ct., Bronx Cty., 1973) (Court concluded that in accordance with the facts of that case, the judgment-debtor had a valid cause of action against the garnishee).

The Special Master, in quoting ¶ 5232.10 of Weinstein-Korn-Miller, made a typographical error. The quoted language of Weinstein-Korn-Miller refers not to the *third* sentence of CPLR 5232(a) but to the *fourth* sentence, which reads as follows:

“... All property not capable of delivery in which the judgment-debtor is known or believed to have an interest then in or thereafter coming into the possession or custody of such a person [the garnishee], including ... all debts of such a person ... *then due or thereafter coming due to the judgment-debtor*, shall be subject to a levy.” (Emphasis supplied)

As indicated in the quoted finding of fact and conclusion of law of the Special Master, Weinstein-Korn-Miller conclude that:

“The fourth sentence of CPLR 5232(a) makes it clear that an effective levy applies not only to the judgment-debtor's property held by the garnishee or debts owed to the debtor by the garnishee at the time of service, but also to any of the judgment-debtor's property that comes into the garnishee's possession or custody or any debt owed to the judgment-debtor coming due while the levy is effective. The continuing nature of a levy under CPLR 5232(a) is in accord with the similar character of the restraining notice and the levy under an attachment. See ¶ 5222.13; CPLR 6214.” 6 Weinstein-Korn-Miller § 5232, ¶ 5232.10 (1972) (Emphasis supplied).*

* Weinstein-Korn-Miller have compared the continuing nature of the levy under an execution to the continuing nature of a levy under an attachment, and vice versa.

Thus on the plain language of the statute, Stuart's levy having attached to *something* at the time of the levy, and having continued to remain effective, attached to later debts owing by Mass Mutual to Simon when they came due.

The Trustee, having cited no authority or logical reason why the finding and conclusion below were erroneous, must fail on this appeal.

POINT II

The Court below did not err in respect of the issues in Point IX of the Trustee's brief, which issues were not raised before it.

It is not clear what the Trustee's position is in Point IX with respect to a stipulation that was entered into between Third National and Stuart prior to their motions for summary judgment (which motions were denied because of the fact of the intervention of the Trustee a day or two before the return date of the motions)*. The only things which *are* clear about the Trustee's Point IX are that (1) it does not allege any error in the opinion below; (2) it makes arguments which were not made below; (3) it is directed to a document not in evidence; and (4) it is not directed to Stuart.

"CPLR 6214 should be compared with CPLR 5232, which governs a levy upon personal property pursuant to an execution. Inasmuch as the language of the two provisions is substantially identical, they should be construed in a consistent fashion." 7A Weinstein-Korn-Miller, § 6214, ¶ 6214.02 (1972).

(See, e.g., *Tenzer, Greenblatt, Fallon and Kaplan v. Abbruzzese*, 57 Misc. 2d 783, 293 N.Y.S. 2d 634 (Sup. Ct., Queens Co. 1968).

* See opinion of Pauman, J. denying the motions for summary judgment and permitting the Trustee to intervene (74a-76a).

The stipulation between Stuart and Third National referred to by the Trustee in Point IX is not part of the record of the Court, never having been filed (or "So Ordered").

The stipulation is by its terms limited to the summary judgment motions, which were denied. Nevertheless, Third National and Stuart have continued in not contesting each other's priorities in the within action, inasmuch as they evidently believe that the Courts would in any event reach the result which in fact has been determined below. Thus, nothing that has occurred here constitutes an improper marshalling of assets and, as the Special Master said (107a), the original stipulation has correctly predicted the outcome of the action.

Inasmuch as the Trustee concedes in Point IX Stuart's priority, Point IX does not really seem to be addressed to Stuart. Obviously it is unnecessary for us to defend Third National, since their able counsel have done so successfully below, and we are confident that they will do so successfully on this appeal.

We do, however, feel constrained, as officers of the Court, to point out briefly to the Court that the entire argument in Point IX should not be entertained, since it was never raised before Judge Frankel below in the Objections filed by the Trustee to the Special Master's Report. Before Judge Frankel, the Trustee made the following objections to the stipulation which, as we have said, was not in evidence and not relevant to the proceedings:

"The Special Master erred at page 27 of his Report, as corrected, in stating that as between Third National Bank and Stuart, the latter has stipulated that the Bank has priority as to all renewal commissions payable under the contract, and the Bank has

conceded Stuart's priority to all sums resulting from floor plan payments and personal commissions. Although this stipulation was entered into prior to the trial of this action and prevailed during the trial, after its conclusion, and in the Reply Post-Trial Memorandum of Stuart, at the last page thereof it is stated:

"Thus, in addition to the sum due and owing to Simon on January 19, 1968, there must be added any subsequent *renewal commissions* or floor plan payments held by Massachusetts Mutual on behalf of Simon, in order to satisfy the judgment pursuant to which the levy was served." (Emphasis Supplied)" (Trustee's Objections to Special Master's Report and Supplemental Report, Objection # 13, 163a-164a).

It is not clear what the Trustee was objecting to: he seems to have been arguing that the quoted portion of Stuart's reply post-trial memorandum contradicted the Special Master's summary of the stipulation (not in the record) between Third National and Stuart. Not only is this manifestly incorrect, but this is *not* the argument raised in Point IX.

The Trustee can hardly be heard to argue that he was not *trying* to make all of his objections before Judge Frankel: the Trustee's extensive objections addressed to the Special Master's Report, supplemented, are specific and extensive and deal with the conclusions of law as well as the findings of fact contained in the Report as between the Trustee and the various parties, including the Special Master's conclusion of law that Stuart's lien was a continuing one (formerly contested in Point VII of the Trustee's brief, but now abandoned by the Trustee).

In other words, whatever objection the Trustee had to the purported effect of the stipulation was waived and abandoned before Judge Frankel. It may not be raised before this Court on this appeal. Cf. *Diapulse Corporation of America v. Curtis Publishing Co.*, 374 F.2d 442, 445 (2d Cir. 1967).

In conclusion, since no error is alleged, since none was committed, and since whatever objections the Trustee may have had were waived and abandoned, this Court need make no separate determination in respect of the alleged merits of Point IX.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment appealed from, in so far as it relates to defendants-appellants Dagmar Auerbach Stuart, Olga Auerbach and Helga Ruth Jennings, be affirmed.

Respectfully submitted,

OTTERBOURG, STEINDLER, HOUSTON
& ROSEN, P.C.

Attorneys for Defendants-Appellees
Dagmar Auerbach Stuart
Olga Auerbach
Helga Ruth Jennings

Of Counsel:

IRWIN B. ROBINS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 74-2180

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of New York) ss.:

Monroe Rosen being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of age and
resides at 421 Hudson Street, New York, N. Y. 10014.

On the 19th day of December, 1974 deponent served the
within Brief of Appellees Dagmar Auerbach Stuart, Olga Auerbach
and Helga Ruth Jennings upon the following:

Yellin, Kenner & Levy, Esqs.
Attention: George Kenner, Esq.
225 West 34th Street
New York, New York 10001

Bleakley, Platt, Schmidt & Fritz, Esqs.
Attention: Jeffrey Cook, Esq.
120 Broadway
New York, New York 10005

by depositing true copies of same enclosed in a post-paid properly
addressed wrapper in a post office official depository under the
exclusive care and custody of the United States Postal Service
within the State of New York.

Monroe Rosen

Sworn to before me on
December 19, 1974

Milton C. Winkler

MILTON C. WINKLER -
Notary Public, State of New York
No. 31-9704765
Qualified in New York County
Commission Expires March 30, 1976

Service of two copies of the within
to the undersigned

By 187
this 19th day of December 1877

Sheldon Love
Attorney(s) for Trudeau

